Spring 2023

A Call for Evidence-Based Research in ADR

Methura Sinnadurai

Benjamin Vanderwindt

Patricia McMahon

Trevor C. W. Farrow

Source Publication:

Canadian Arbitration and Mediation Journal 32.1, ADR Institute of Canada pp.13-16, 2023.

A Call for Evidence-Based Research in ADR

In any three-year period, almost half the adult population in Canada will experience at least one justiciable civil or family problem.[1] Few, however, will have the resources to resolve their legal problems, thus highlighting longstanding barriers that make access to justice such a pressing issue in Canada.[2] Among many global justice initiatives, a prominent call to action is Goal 16 of the 2030 United Nations Sustainable Development Goals, which commits nations to work towards ensuring equal access to justice for all by 2030.[3] Although there is no single strategy to achieve this, evidence-based practices in all areas of civil and family justice can help close the access-to-justice gap by shining a light on where gaps exist and suggesting how they may be closed.

In addressing the crisis of access to justice, this article explores the need to include research relating to alternative dispute resolution (ADR) within the broader call for data-based justice initiatives.

The Need for Evidence-based Research within the Broader Legal Field

Professions are increasingly being called upon to revise their methods to incorporate evidence- based research. Medical schools, for instance, include evidence- based practices as important aspects of good medicine, and several studies have examined the impact of integrating such practices and an awareness of research into the curriculum.[4]

The legal community is receiving calls for evidence-based research[5] in the hope that data-based initiatives will help legal systems more efficiently and effectively address impediments to accessing the legal system for those in need. The Chief Justice of Canada has described the inability to access justice as not only a democratic issue but also a human rights and economic issue.[6]

Many factors hinder access to justice, including the cost of proceedings, complexity of disputes, systemic barriers, a lack of

METHURA SINNADURAI

JD, Osgoode Hall Law School; Research Assistant, Winkler Institute for Dispute Resolution

PATRICIA I. MCMAHON, PHD.

J.S.D., Assistant Professor, Osgoode Hall Law School; Co-Academic Director, Winkler Institute for Dispute Resolution; Director, Oral History Program, Osgoode Society for Canadian Legal History, https://www.osgoode.yorku.ca/faculty-and-staff/patricia-mcmahon/

BENJAMIN VANDERWINDT

JD Candidate 2023, Osgoode Hall Law School; Research Assistant, Winkler Institute for Dispute Resolution.

TREVOR CW FARROW, PHD.

Professor & Associate Dean (Research & Institutional Relations), Osgoode Hall Law School; Co-Academic Director, Winkler Institute for Dispute Resolution; Chair, Canadian Forum on Civil Justice, https://www.osgoode.yorku.ca/faculty-and-staff/farrow-trevor-c-w/

resources, and even a basic lack of awareness about available services.[7] Although there have been many reform efforts to date, the gaps in access continue to grow.[8] Unfortunately, the lack of empirical data about access to the Canadian justice system and experiences relating to the resolution of legal disputes hinders the potential to engage in effective justice reform.[9] As Lisa Moore, the Director of the Canadian Forum on Civil Justice, explains,

> rigorous fact-seeking is the standard that gives credibility to the law's oft-cited assurances of impartiality and due process. Yet, the very legal mechanisms for which this standard informs and justifies decisions are often themselves without the data necessary to evaluate the frameworks within which they operate.[10]

Data and evidence provide insight into the scale of a problem and the cost-effectiveness of potential solutions.[11] The Edmonton Social Planning Council found that "one of the key barriers to progress in improving access to justice is the lack of information on the effectiveness of legal services, and an absence of tools to measure and define progress towards equal justice."[12]

If it is to advance investment strategies aimed at effectively responding to people's needs within the justice system, the legal community must collect more data to identify who experiences legal problems, how relevant information and services may be accessed, and what processes might work to address these problems efficiently and effectively.[13] To make meaningful progress towards ensuring equal access to justice for all, we require a better understanding of the current justice framework and the effectiveness of dispute resolution mechanisms across various legal matters. Evidence-based research is necessary to make real improvements to the justice system. Proper reform cannot be built on anecdotes and philosophical considerations alone.

Relevance of Data-Based Justice Initiatives to ADR Research

Within the broad call for evidence-based legal research, there is a need for ADR-specific research. For our purposes, we define alternative dispute resolution broadly and include all methods of dispute resolution outside the established adjudicative function of courts and tribunals.[14] ADR comprises many, sometimes complex, methods that require highly trained and diligent practitioners. Increasingly common and described as "successful," ADR has acquired an integral role within the justice system.

During the 1990s and 2000s, ADR enjoyed a surge in popularity within the Canadian legal community. Twenty years ago, there was a widespread—though lightly documented—acknowledgment of its benefits. In 1999, the Ontario legal system incorporated Rule 24.1 into the Rules of Civil Procedure. Rule 24.1 established mandatory mediation, in specific contexts, because of its ability to "reduce cost and delay in litigation and facilitate the early and fair resolution of disputes."[15]

In those early days, there was excitement to research and write about ADR and its potential uses as an up-and-coming legal area.[16] As Trevor Farrow wrote in 2003, "there has been an ever-expanding body of ADR literature and online materials."[17] More recently, in the 2018 case of *Canfield v. Brockville Ontario Speedway*, the Ontario Superior Court of Justice endorsed the benefits of mediation before litigation.[18]

A resolution found through ADR can often respond to issues of more complexity in a timely and mutually beneficial way. Although some concerns have been raised,[19] ADR has led to breakthroughs in certain social justice issues. For example, in the urgent and relevant issue of climate change, ADR is said to be uniquely suitable to deal with climate change conflicts. As Kariuki and Sebayiga explained, "ADR mechanisms are better suited to manage climate change conflicts because of their ability to address the root causes of the conflicts while preserving relationships."[20]

Implementation of ADR has been widespread across Canada and other countries, yet there remain significant research gaps to prove when and where it is most beneficial. ADR offers legal practitioners another set of tools, but they must push their understanding further and define how to best maximize those tools as a profession.

A lack of robust evidence-based research risks undermining the evolution and even the credibility of ADR. While reiterating the call for more evidence-based research within ADR by academics and practitioners, the purpose of this article is not to examine the history of ADR research. Nevertheless, some recent completed examples may be instructive.

In 2021, The Legal Education Foundation (TLEF) published a report that analysed and combined studies about ADR, specifically mediation and court outcomes, in Australia, Canada and the United States. Some of the research that was reviewed found that mediation had an overall positive impact on the resolution of small claims matters, in both the long-term and short-term, in comparison to "court-based processes for similar matters."[21] The report observed that "there is an obvious

lack of robust empirical research comparing court-based and mediated processes across the board.…It may not be possible to identify certain benefits or risks without well-funded pilot projects and follow-up research."[22] The findings of mediation having a positive impact compared to court outcomes may not be surprising to many practitioners of ADR in Canada. Similarly, the findings of a shortage of empirical research on mediation could be expected.

In a California-based study, Tucker et al. addressed the shortcomings in existing literature examining the outcome of parent-child mediation on family functioning and child problem behaviors.[23] Research in this area is important to determine the efficacy and scope of existing youth-oriented mediation programs among public and private juvenile justice and social service agencies and, as such, is also applicable in the Canadian context.[24] In this study, families with a middle school or high school-aged child referred to a community-based agency in California for family mediation due to poor grades, truancy, defiant behavior, delinquency, and substance abuse were assigned to either an intervention group or a wait-list control group.[25] Families in the intervention group participated in at least one family mediation, and all families completed three surveys (baseline, six weeks later, and 12 weeks later) assessing family communication, conflict, cohesion, child substance abuse intentions, grades, and reported delinquency.[26] The results indicated that families participating in the parent-child mediation displayed modest improvements in family functioning and child problem behaviors over six weeks; however, the positive gains appeared to be somewhat short-lived as they diminished by the 12-week follow-up.[27]

Studies like the one by Tucker et al. provide a good example of the kind of research that can and should be done to explore the perceived and actual benefits of ADR processes, and how those processes can be improved. In other words, to what extent does mediation accomplish what its proponents claim it accomplishes? It would be useful to assess the relationship between the type of child behavioral problems and the effectiveness of parent-child mediation.

Furthermore, as we noted above, with respect to the need for evidence-based research, future studies should also examine the mediation process itself,[28] meaning how does what happens during mediation impact the participants and their outcome?

A relatively recent Canadian example of evidence-based ADR research involves a study by the former Canadian Research Institute for Law and the Family. The study looked at the cost implications of using different ADR processes in four different Canadian provinces. Using interviews and a social return on investment-based methodology, this study provides insights into the merits of using various ADR processes in the context of high and low conflict cases.[29]

A Call to Action

Empirical research and experimentation in science and medicine fosters change and innovation. The legal field, however, lacks the same urgency towards and acceptance of evidence-based research. This gap has been recognized by various organizations, including the Canadian Forum on Civil Justice (CFCJ), for more than twenty years.[30] The call for evidence-based data in the legal community is critical concerning the ADR field. As Genevieve Chornenki discussed in the Fall 2022 issue of the Canadian Arbitration and Mediation Journal, the field of dispute resolution needs to develop a culture of research.[31] Research-backed methods work towards honing and crafting the profession to maximize resources and increase access to justice.

Although they are more costly and require increased collaboration, longitudinal studies with larger sample sizes are needed to examine the effectiveness of ADR interventions on outcomes, the costs and benefits over time, and their ability to promote access to justice.[32] There is literature on mediation outcomes, but very little that assesses the mediation process itself. Research is needed the examine the extent to which elements of ADR have an impact on the outcome of a dispute, like the number of completed mediation sessions, the mediator-client dynamics, caucusing techniques, and how similar procedural factors impact the outcomes, efficacy and fairness of the process.[33] Other areas of research include the role that mandatory ADR plays in the traditional court system and online dispute resolution, along with systemic, subjective and contextual factors, including power, gender, race, culture, human rights and ethics.[34]

The limited availability of empirical data relating to ADR processes may be due to the anecdotal and flexible nature of ADR. However, as Trevor Farrow reiterated in his article examining dispute resolution teaching and research programs, the current scarcity "provides significant opportunities for future research initiatives—including those of a collaborative and/or interdisciplinary nature—undertaken by full-time academics, LL.B. students, and graduate students."[35] His statement is as true today as it was when he made it in 2005. Coordinating justice data across institutions and actors within the ADR

community will thus play a vital role in addressing the justice data gaps and enhancing our understanding of the current justice framework.[36]

Increased research will benefit both ADR practitioners, academics, and clients. Without research, there is a risk that negotiation and mediation processes and practice will lack meaningful empirical rigour. We contend that, without empirical research, ADR cannot continue to develop and thrive to its full potential.

ADR continues to enjoy wide popularity and use in the legal community. There is excitement, credibility, and potential for further growth for ADR, and with good reason. ADR offers Canadians an important way to improve access to justice. Good evidence-based ADR research is happening, and that research is driving the future of legal practice. The next generation of legal professionals is especially keen on ADR as evidenced by its popularity among law students, given their participation in moots and enrolment in course offerings on the subject. But, as a component of legal scholarship, we are behind the evidence-based practices of other professions. We encourage all ADR practitioners and researchers to keep up and increase data-based initiatives. To further the field of ADR, inspire junior legal scholars, and pursue access to justice, there must be a focus on producing more evidence-based ADR research.

---

1. Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* (Ottawa: Department of Justice Canada, 2007) at 10; Trevor CW Farrow et al., *Everyday Legal Problems and the Cost of Justice in Canada, Overview Report* (Toronto: Canadian Forum on Civil Justice, 2016). Compare recent Statistics Canada, "Canadian Legal Problems Survey (CLPS)" (2022), online: *Government of Canada* ←www.statcan.gc.ca/en/survey/household/5337→. The term "justiciable problem" includes issues that engage legal principles, regardless of whether any action taken to deal with the event involves the use of any part of the civil justice system. See e.g. Hazel Genn, *Paths to Justice: What People Do and Think about Going to Law* (Oxford: Hart, 1999) at 12.
2. Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, October 2013) at 6, online: *CFCJ* ←https://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf→ ["A Roadmap for Change"].
3. *Ibid* at 29.
4. JL Dorsch et al., "Impact of an evidence-based medicine curriculum on medical students' attitudes and skills" (2004) 92:4 J Med Libr Assoc 397 at 406.
5. Marin dos Santos & Douglas Henrique, "Evidence-Based Law: A New Approach to Legal Practice Under the Scope of the Pragmatic Methodologies of Evidence-Based Medicine" (17 June, 2021) at 4, online: ←pubmed.ncbi.nlm.nih.gov/154494754/→.
6. The Right Honourable Richard Wagner, PC, "Access to Justice: A Social Imperative" (4 October, 2018), online: Supreme Court of Canada ←https://www.scc-csc.ca/judges-juges/spe-dis/rw-2018-10-04-eng.aspx?pedisable=true→.
7. "A Roadmap for Change", *supra* note 2.
8. Task Force on Justice, *Justice for All – Final Report* (New York: Center on International Cooperation, 2019) at 18, online: ←www.justice.sdg16.plus/_files/ugd/90b3d6_746fc8e4f9404abeb994928d3fe85c9e.pdf→ ["Justice For All – Final Report"].
9. *Ibid*.
10. Lisa Moore, "Understanding the Need for More Evidence-Based Decision-Making in Legal Sector and How We Get There" (4 February 2021), online: *Slaw* ←www.slaw.ca/2021/02/04/understanding-the-need-for-more-evidence-based-decision-making-in-the-legal-sector-and-how-we-get-there/#_ftn3→.
11. "Justice for All – Final Report," *supra* note 8 at 103.
12. Maxwell Jenkins, "Access to Justice: The Great Gap in Canada's Justice System" (Oct 2017) at 14, online: *Edmonton Social Planning Council* ←edmontonsocialplanning.ca/wp-content/uploads/2017/10/edmontonsocialplanning.ca_joomlatools-files_docman-files_ESPC-Documents_PUBLICATIONS_A.06.G-REPORTS_ESPC-REPORT_ACCESS-TO-JUSTICE_20170930.pdf↑.
13. Peter Chapman et al., *Grasping the Justice Gap: Opportunities and Challenges for People-Centered Justice Data* (Washington, D.C.: World Justice Project; New York: Pathfinders for Peaceful, Just and Inclusive Societies; Paris: OECD, 2021) at 5, online: *World Justice Project* ←https://worldjusticeproject.org/sites/default/files/documents/Grasping-the-Justice-Gap_Challenge-Paper_final.pdf→.
14. Jerameel Kevins, "Towards Enhancing Access to Justice through Embracing Alternative Dispute Resolution Mechanisms in Kenya" (7 November 2022) at 6, online: SSRN ←papers.ssrn.com/sol3/papers.cfm?abstract_id=4270724→.
15. RRO 1990, Reg 194, r 24.1.01.
16. Trevor CW Farrow, "Thinking About Dispute Resolution" (2003) 41:2 Alta Law Rev 559 at 560.
17. Ibid.
18. ONSC 328 at para 41.
19. Trevor CW Farrow, *Civil Justice, Privatization, and Democracy* (Toronto: UofT Press, 2014).
20. Francis Kariuki & Vianney Sebayiga, "Evaluating the Role of ADR Mechanisms in Resolving Climate Change Disputes" (2022) 10:3 Alternative Dispute Resolution 1 at 13.
21. Daisy Ogembo, "Rapid evidence review: The impact of mediation on outcomes, experience and bias" (Surrey: The Legal Education Foundation, October 2021) at 24, online: ←research.thelegaleducationfoundation.org/wp-content/uploads/2021/10/FINAL-Rapid-Review-Mediation-4-SINGLE-PAGES.pdf→.
22. *Ibid.*
23. Joan S Tucker et al., "Effectiveness of Parent-Child Mediation in Improving Family Functioning and Reducing Adolescent Problem Behavior: Results from a Pilot Randomized Controlled Trial" (2017) 46:3 J Youth Adolesc 505 at 506 ["Effectiveness of Parent-Child Mediation"].
24. *Ibid*.
25. *Ibid* at 507.
26. *Ibid*.
27. *Ibid* at 512.
28. *Ibid.*
29. Joanne Paetsch et al., *An Evaluation of the Cost of Family Law Disputes: Measuring the Cost Implications of Various Dispute Resolution Methods* (Toronto: Canadian Forum on Civil Justice, December 2017).
30. Lisa Moore, "Fixing a Problem That We Don't Fully Understand" (15 August 2019), online: *Canadian Forum on Civil Justice* ↓https://cfcj-fcjc.org/a2jblog/fixing-a-problem-that-we-dont-fully-understand/#_ftn4↑.
31. Genevieve A Chornenki, "Editorial—Towards a Culture of Research in Dispute Resolution" (2022) 31:2 Can Arb & Med J at 19.
32. For some current longitudinal access to justice research efforts, see e.g. Trevor CW Farrow, Lisa Moore & Ab Currie, "Measuring Impacts of Legal Services: Bibliography, Network and Methodology" (Toronto: Canadian Forum on Civil Justice, June 2020), online: CFCJ ↓cfcj-fcjc.org/wp-content/uploads/Measuring-Impacts-of-Legal-Services-Bibliography-Network-and-Methodology-%E2%80%93-Trevor-Farrow-Lisa-Moore-and-Ab-Currie.pdf→.
33. "Effectiveness of Parent-Child Mediation," supra note 23 at 512.
34. See e.g. Trevor CW Farrow, "Dispute Resolution, Access to Civil Justice and Legal Education" (2005) 42:3 Alta L Rev 741 at 785.
35. *Ibid*.
36. "Justice for All – Final Report," supra note 8.